UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ROGER M. WHEELER, Appellant, v. DEPARTMENT OF THE ARMY, Agency.	DOCKET NUMBER DE07528810421 DATE: MAR 11 1991

Barrie Shapiro, Esquire, Lakewood, Colorado, for the appellant.

James R. Tanner, Esquire, Tooele, Utah, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Samuel W. Bogley, Member

OPINION AND ORDER

This case is before the Board upon the appellant's petition for review of the December 29, 1988 initial decision that sustained the agency's removal action. For the reasons presented below, the Board GRANTS the appellant's petition and AFFIRMS the initial decision as MODIFIED by this Opinion and Order.

BACKGROUND

The appellant petitioned the Board's Denver Regional Office for appeal of the agency's action removing him from the position of Tool and Parts Attendant, WG-04. The agency charged the appellant with: (1) Failure to observe written instructions; (2) knowingly accepting compensation benefits to which he was not entitled; (3) misrepresentation by concealing a material fact; and (4) falsifying information.[1] Specifically, the agency alleged that the appellant made false statements about his back condition in order to continue working only half-time and receiving partial workers' compensation benefits. The agency also alleged that the appellant exercised at the Cottonwood Back Institute on September 23, 1988, after an agency physician placed him on 72 hours of rest for his back injury.

In 1986, the appellant had injured his back while on the job.[2] Due to his injury, the appellant was given light duty work for five hours each work day and was paid federal workers' compensation benefits.[3] On March 31, 1988, during a medical evaluation at the Stewart Rehabilitation Center, the appellant informed physical therapist Brian Morgan that he: (1) Was unable to tolerate more than five hours of his light duty job; (2) could not walk for more than fifteen minutes or sit for longer than five minutes without extreme

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[1] *See* Initial Appeal File (IAF), Tab 5, Subtab B.

[2] *See id.* at Subtab II.

[3] *See id.* at Subtabs P and HH.

difficulty; (3) could not bend from the waist; (4) was unable to rake leaves, shovel snow, or engage in other maintenance-type activities around his home or on his car; and (5) had not attempted to work on his car since the previous fall because it aggravated his lower back pain. He also stated that lifting, stooping or bending aggravated his symptoms.[4]

On March 31, 1988, an agency investigator observed the appellant traveling to and from the Stewart Rehabilitation Clinic. En route to the clinic, the appellant stopped at a coin-operated car wash facility, where he manually washed, rinsed, and dried his truck. The appellant was observed twisting, bending at the waist, and stooping as he dried the vehicle. The investigator videotaped the appellant performing these activities. On the same day, the investigator observed the appellant driving his truck from 5:05 pm until 5:45 pm without once stopping to stretch. On April 1 and 2, 1988, the appellant worked on his car at an auto mechanic's shop.[5]

On April 12, 1988, during a follow-up physician evaluation, as part of his routine occupational health screening, the appellant stated, inter alia, to Dr. David B. Jack, the doctor examining him, that: (1) He was unable to work on cars or to bend over; (2) his back was aggravated by twisting at the waist and lying on his back; and (3) it took

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[4] *See id.* at Subtab U.

[5] *See id.* at Subtab O.

him two hours to drive home from the Stewart Rehabilitation Clinic because he had to make frequent stops to stretch and walk around the car.[6]

In his petition for appeal, the appellant challenged the agency's removal action and alleged that the agency had discriminated against him on the basis of physical handicap. The administrative judge granted the appellant a hearing on the matter, and the videotape of the appellant's activities was entered into evidence.

The administrative judge found, based on the evidence presented, that the agency sustained its charges that the appellant made false statements and misrepresented his physical condition. He also found that the appellant's offense constituted a fraud on the agency by which the appellant knowingly received benefits to which he was not entitled. The administrative judge, however, did not sustain the agency's charge that the appellant exercised on September 23, 1988, after being placed on 72 hours of rest. The administrative judge found that it would not promote the efficiency of the service to punish employees for seeking alternative medical treatment for their injuries. He also found that the appellant failed to establish his affirmative defense of handicap discrimination because he failed to show that his handicap caused his misconduct as required under *Brinkley v. Veterans Administration*, 37 M.S.P.R. 682, 686-87 (1988). Applying the criteria set forth in *Douglas v.*

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[6] *See id.* at Subtab R.

Veterans Administration, 5 M.S.P.R. 280, 306 (1981), the administrative judge found the penalty of removal reasonable and sustained the agency's removal action.

The appellant has filed a petition for review of the initial decision, alleging that: (1) The administrative judge's findings are inconsistent with the evidence in the record; (2) the administrative judge erred in his credibility findings; and (3) the penalty of removal is unreasonable in this case. The appellant also alleges new and material evidence consisting of an Office of Workers' Compensation Programs (OWCP) letter, which states that the appellant is still disabled and rejects the agency's challenge to the appellant's entitlement to compensation benefits.[7]

ANALYSIS

1. The appellant has failed to show error by the administrative judge in his determinations on the agency's charges of failure to observe instructions, misrepresentation, and falsifying information.

In *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987) the Board held that, to resolve credibility issues, an administrative judge must identify the factual questions in dispute, summarize all of the evidence on each disputed factual question, state which version he or she believes, and explain in detail why the chosen version is more credible than the other version or versions of the event. The Board also enumerated several factors that must be

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[7] See Petition For Review File, Tab 1.

considered in making and explaining a credibility determination.[8] See, e.g., *Nefi v. Department of Treasury*, 39 M.S.P.R 142 (1988), and *Berkey v. United States Postal Service*, 38 M.S.P.R. 55 (1988) (applying the Board's finding in *Hillen*).

We find here that, while the administrative judge did not specifically cite to *Hillen*, he correctly resolved the credibility determinations in accordance with *Hillen*. The administrative judge first identified the factual questions in dispute, identified the agency's charges, and then summarized the evidence that the agency and the appellant presented with respect to the charges. The administrative judge then stated that he credited the agency's version, and explained why he found the appellant's version incredible.[9]

The administrative judge found the statements that the appellant made to the treating doctor and the physical therapist to be inconsistent with his testimony and the videotape of the incident at the car wash. The administrative judge also noted that the appellant offered no explanation for the statements he made to the doctor and physical therapist. He also found incredible the

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[8] The factors to be considered are: (1) The witness's opportunity and capacity to observe the event or act in question; (2) the witness's character; (3) any prior inconsistent statement by the witness; (4) the witness's bias or lack of bias; (5) the contradiction of the witness's version of events by other evidence or its consistency with other evidence; (6) the inherent improbability of the witness's version of the events; and (7) the witness's demeanor.

[9] See Initial Decision at 2-3.

appellant's testimony that he was only able to wash his vehicle with considerable and apparent pain. Although the administrative judge did not specifically discuss every evidentiary matter, or *Hillen* factor, this does not mean that he did not consider them. *See Neff*, 39 M.S.P.R. at 145; *Smith v. Office of Personnel Management*, 31 M.S.P.R. 406, 410 (1986). Thus, the administrative judge's analysis satisfied the requirements set forth in *Hillen*, and the appellant has not established that the administrative judge erred in sustaining the agency's charge.[10]

The appellant asserts that the administrative judge's findings conflict with the determination made by OWCP. The November 8, 1988, letter from a Claims Examiner of the OWCP, submitted with the petition for review, informs the agency that it did not agree with the agency's controversion of the appellant's disability and that it will continue to pay the appellant OWCP benefits. Attached to the OWCP letter is a statement by Dr. Steinhardt, who examined the appellant on October 12, 1988, at the request of OWCP, regarding the appellant's physical condition.[11] The appellant asserts that based on the OWCP letter the agency should not have removed him, but, rather, should have placed him on full-time light duty.

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[10] Moreover, we note that in his petition for review, the appellant has not addressed each of the charged incidents or even attempted to show error in the administrative judge's findings as to each of those matters.

[11] *See* Petition for Review File, Tab 1.

OWCP's determination that the appellant suffered a compensable injury does not preclude the Board from addressing the specific issue of whether the appellant intentionally provided false information in order to receive compensation benefits. *See Miner v. United States Postal Service*, 31 M.S.P.R. 369, 373 (1986), *aff'd sub nom. Minor v. Merit Systems Protection Board*, 819 F.2d 280 (Fed. Cir. 1987) (the Board sustained the agency's removal of the appellant on charges of falsification even though OWCP determined that the appellant suffered a compensable injury); *Miller v. United States Postal Service*, 26 M.S.P.R. 210, 212-13 (1985) (the Board found that the appellant's fraudulent conduct in obtaining Federal Employee Compensation Act benefits was not within the exclusive jurisdiction of OWCP, and, therefore, the Board could sustain the appellant's removal, which was based upon the false representations made by the appellant in the OWCP proceedings).

In the present case, the Board is being asked to review the appropriateness of the agency's action and to rule upon the issue of whether the appellant intentionally made false statements to Dr. Jack and Mr. Morgan in order to receive compensation benefits. The Board's determination of this issue is distinguishable from OWCP's determination that the appellant suffered a compensable injury. *See Miller*, 26 M.S.P.R. at 213.

OWCP's ultimate determination that the appellant suffered a compensable injury does not specifically contradict the administrative judge's finding that the appellant made false statements in connection with his compensation claim. *See id.* Therefore, we find that, regardless of OWCP's ultimate determination, the administrative judge properly found that the appellant intentionally made false statements to the doctor and physical therapist in order to obtain compensation benefits.

In its decision, OWCP found that the appellant was entitled to OWCP benefits. The issue of the appellant's entitlement to OWCP benefits is within the exclusive jurisdiction of OWCP. *See Minor v. Merit Systems Protection Board*, 819 F.2d 280, 283 n.4 (Fed. Cir. 1987); *Miller*, 26 M.S.P.R. at 213. Accordingly, the Board defers to OWCP's determination and vacates the administrative judge's finding that the appellant received benefits to which he was not entitled.

2. The penalty of removal was reasonable under the circumstances.

The appellant alleges in his petition for review that the penalty of removal was unreasonable under the circumstances of this case. In support of this allegation, he asserts that: (1) The agency failed to present any evidence regarding past disciplinary or performance problems it encountered with him; (2) he has performed satisfactorily in his light duty position; and (3) the agency should have

first placed him on full-time light duty instead of removing him.

The Board may determine whether the agency-imposed penalty is clearly excessive, disproportionate to the sustained charges, arbitrary, capricious or unreasonable. *See McDowell v. Department of the Navy*, 39 M.S.P.R. 179, 181 (1988). Where, as in the present case, an agency's action is based on multiple charges, some of which are not sustained, the administrative judge must make an independent evaluation to determine whether the sustained charges warrant the penalty imposed by the agency. *See id.* at 181-82; *Cook v. Department of the Navy*, 34 M.S.P.R. 26, 28 (1987). Therefore, the administrative judge did not err by re-evaluating the propriety of the agency's chosen penalty.

In reviewing the appropriateness of a penalty, the Board's function is to assure that the agency's managerial judgment has been properly exercised within the tolerable limits of reasonableness. *See Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 302 (1981). The fact that an administrative judge does not specifically apply all the *Douglas* factors does not constitute error. *See Social Security Administration v. Davis*, 19 M.S.P.R. 279, 282-83, *aff'd sub nom. Davis v. Department of Health and Human Services*, 758 F.2d 661 (Fed. Cir. 1984) (Table). In the present case, the administrative judge found that the penalty of removal was appropriate based on the following reasons: (1) Falsification is a serious offense; (2) the

offense constituted deliberate deception for personal gain; (3) the agency considered removal necessary to deter similar conduct by other employees; and (4) the penalty of removal was within the range of penalties specified in the agency's table of penalties.

Although on review we have not sustained the administrative judge's finding that the appellant received benefits to which he was not entitled, nonetheless, we concur with the administrative judge's finding that the penalty of removal was reasonable under the circumstances. Falsification is a serious offense because it strikes at the very heart of the employee-employer relationship. *See Ensinger v. Department of the Air Force*, 36 M.S.P.R. 430, 435 (1988). Indeed, the Board has upheld removal for falsification because such an offense raises serious doubts as to the appellant's honesty and fitness for employment. *See Ensinger*, 36 M.S.P.R. at 435; *Fugua v. Department of the Navy*, 31 M.S.P.R. 173, 177 (1986). Additionally, as the administrative judge found, the penalty of removal was within the specified range of penalties in the agency's table of penalties.[12]

Although the appellant's past performance is a proper mitigating factor for consideration of the appropriateness of the penalty, the appellant's past work record and lack of

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[12] *See* IAF, Tab 5, Subtab JJ.

disciplinary history are insufficient to warrant mitigation of the penalty of removal due to the seriousness of the offense. *See, e.g., Ensinger*, 36 M.S.P.R. at 435; *Ott v. Department of the Army*, 20 M.S.P.R. 90, 91-92, *aff'd*, 758 F.2d 667 (Fed. Cir. 1984) (Table); *Lemons v. Department of the Air Force*, 12 M.S.P.R. 239, 243-44 (1982).

ORDER

This is the Board's final order in this appeal. *See* 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request further review of the Board's final decision in your appeal.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review the Board's final decision on your discrimination claims. *See* 5 U.S.C. § 7702(b)(1). You must submit your request to the EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, DC 20036

You should submit your request to the EEOC no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7702(b)(1).

Discrimination and Other Claims: Judicial Action

If you do not request review of this order on your discrimination claims by the EEOC, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You should file your civil action with the district court no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(2). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a handicapping condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you choose not to seek review of the Board's decision on your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review the Board's final decision on other issues in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(b)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.